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Supreme Court, U.S.
FILED

No. 10-1397

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Supreme Court of the United States

ALICE COX,

Petitioner,

v.

DESOTO COUNTY, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an action under 42 U.S.C. § 1983, should a federal court apply federal or state claim preclusion rules?

2. In an action under 42 U.S.C. § 1983, does claim preclusion apply to a non-judicially reviewed determination of a state administrative agency?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Alice Cox, Petitioner;
2. Jim Waide, Counsel for Petitioner;
3. DeSoto County, Mississippi, Respondent;
4. David A. Barfield, Esq., Counsel for Respondent; and
5. Steven Lloyd Lacey, Esq., Counsel for Respondent.

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The January 13, 2011 reported opinion of the United States Court of Appeals for the Fifth Circuit following the second appeal, 2011 WL 116318 (5th Cir. 2011), is reproduced as Appendix 1. The May 13, 2010 unreported opinion of the United States District Court for the Northern District of Mississippi on remand is reproduced at Appendix 11. The April 3, 2009 reported opinion of the United States Court of Appeals for the Fifth Circuit, 564 F.3d 745 (5th Cir. 2009), is reproduced at Appendix 21. The May 1, 2007 unreported opinion of the United States District Court for the Northern District of Mississippi, affording collateral estoppel effect to the Mississippi Department of Employment Security ("MDES") decision, is reproduced at Appendix 29. The January 28, 2005 unreported decision of the appeals referee of the Mississippi Department of Employment Security Commission, finding Petitioner committed work-related misconduct, is reproduced at Appendix 38. The October 5, 2009 denial of Petition for Writ of Certiorari of the United States Supreme Court, ___ U.S. ___, 130 S.Ct. 139 (2009), is reproduced at Appendix 44. The January 13, 2011 order of the United States Court of Appeals for the Fifth Circuit denying petition for rehearing, 2011 WL 116318 (5th Cir. 2011), is reproduced at Appendix 45.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on January 13, 2011, petition for rehearing en banc denied on February 2, 2011, by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is Amendment One of the United States Constitution, which says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statute involved is 42 U.S.C. § 1983, which says:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Alice Cox, a DeSoto County, Mississippi jailer, reported to her superiors that she had witnessed other officers and a jail trusty assault an inmate.

Two months later, Petitioner was fired. She then applied for unemployment benefits.

Respondent DeSoto County, Mississippi contested Petitioner's claims for unemployment benefits. Respondent claimed Petitioner's statements concerning the assault were false, thus constituting "misconduct." Employment-related misconduct renders a

discharged employee ineligible for unemployment benefits under Mississippi law.[1]

A short hearing was held about six weeks after Petitioner's firing before a "referee" of the Mississippi Department of Employment Security. The only issue at the unemployment benefits hearing was whether Petitioner's statements constituted "misconduct," as defined by Mississippi law. App. 38.

While Respondent was represented by counsel at the hearing, Petitioner was not represented.[2] No discovery was allowed. At the hearing, Respondent's officials testified that the inmate had denied being abused. Chief Jail Administrator Adkinson testified the matter had been investigated by the Respondent and that the Respondent had determined that "comments that Ms. Cox made about the employees beating inmates were totally false and based upon these reasons she was let go." Another jail official testified Petitioner had given inconsistent statements about

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[1] Miss. Code Ann. § 71-5-513(A)(1)(b) states:

> For the week, or fraction thereof, which immediately follows the day on which he was discharged for misconduct connected with his work, if so found by the department, and for each week thereafter until he has earned remuneration for personal services performed for an employer, as in this chapter defined, equal to not less than eight (8) times his weekly benefit amount, as determined in each case.

[2] The MDES specifically advises claimants, such as Petitioner, that they do not need an attorney. See http://mdes.ms.gov/Home/FAQ/unemploymentServices.html.

whether she actually saw a jailer's fist make contact with the inmate's back. Under questioning by Respondent's attorney, this jail official testified:

> Q. Did she state, she actually stated in that document and I quote, that "Sgt. Winters hit Marcus in the back after he was down?"
>
> A. Yes she did.
>
> Q. And in your conversation with her during your investigation, did she concur that she actually saw Sgt. Winters hit Marcus in the back after he was down?
>
> A. She did not. When I took her tape recorded statement, she said that she did not witness any physical contact by an officer at all.

The inmate (Lewis) was not called as a witness at the unemployment hearing. Petitioner was the only person who was present during the incident and who testified at the unemployment hearing. Under questioning by the MDES referee, she testified:

> Q. Okay. How did you base the statement that Mr. Armstead, I'm sorry, did you see Mr. Armstead physically strike this inmate Marcus?
>
> A. I saw him raise his foot and go in to kick. I didn't see the foot touch Marcus Lewis, and when it was all done, and they were out in the med room clearing

their eyes, he bragged about putting his foot in Marcus' butt.

Q. Okay. If you didn't personally see Mr. Winters[3] actually strike the inmate, or Mr., or Mr. Marcus' back, why would you make a statement that you saw him punch him in the back?

A. I saw them when they came in to med cell three. Their backs were to me and they took him down on the floor and I saw Sgt. Winters' arm come up and when it went down, Marcus Lewis said, Oh my back. And from that and what Sgt. Winters was bragging to the fact that he said to Sgt. Kemp when they were out in front me, said, did you see me bury my fist in his back, so that, I concluded that this justified what I wrote in there.

Following the hearing, the referee found Petitioner's statements about the assault constituted "misconduct" and denied her claim for unemployment benefits. App. 38.

Petitioner filed an appeal of the agency's denial of her unemployment benefits but subsequently withdrew that appeal. Petitioner then filed this 42 U.S.C. § 1983 action in the United States District Court for

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[3] The referee had confused the jailer (Deputy Winters) with a jail trusty (Armstead), who had also participated in the assault on the inmate.

the Northern District of Mississippi. Petitioner's amended complaint alleges that she was fired in retaliation for the reporting of the abuse in violation of her free speech rights under the First Amendment to the United States Constitution. Alternatively, Petitioner alleges that her termination violated the Age Discrimination in Employment Act ("ADEA").

In discovery in this case, Petitioner obtained the inmate's statement. The Respondent had the statement at the time of the MDES hearing but did not disclose it to either the referee or the Petitioner. In this recorded, transcribed statement, the inmate had actually corroborated Petitioner's claims. The inmate, under interrogation by a deputy, had stated he was assaulted by deputies and by a trusty.

> DM:[4] Now, you, you said that this officer right here – you believe he hit you a couple of times somewhere in the back of the head?
>
> ML:[5] Yes, sir. I know he hit in [sic] in the back of the head and in the side of my face.
>
> . . .
>
> DM: Okay. After that happened, they, they let, they let you up?

---

[4] Investigating deputy.

[5] Inmate Lewis.

> ML: Yeah, I'd say after, after, after he hit me that second time when I turned my head and, and I, I, I think I told, I th nk I told them (INAUDIBLE) then he said (INAUDIBLE) with this (INAUDIBLE) you're (INAUDIBLE), you know what I'm saying, that's when I, that's, that's when I caught this one right here in the back of my head. That's when I turned my head and I seen him, I was looking at him when he (INAUDIBLE) and I hurried up and turned my head so he wouldn't hit me in the face and he hit in the back of the head and then Kemp got up off of me and told him, I think he was telling him to back up, telling him to back up and they were easing out of the door and, up, the one that had, up handcuffed me – he was picking me up by the handcuffs telling me to stand up and when I was standing up I was looking at them and I told them, I said man, you're going to pay for that.

Without differentiating between the ADEA and First Amendment claims, the district court found that Petitioner's claims of wrongful termination are barred by the state agency's finding she was terminated because of misconduct. App. 21.

On appeal, the United States Court of Appeals for the Fifth Circuit concluded that the district court was in error in finding the ADEA claim is barred by findings of a state administrative agency. However,

the Fifth Circuit interpreted *Univ. of Tennessee v. Elliott*, 478 U.S. 788 (1986) to mean that state collateral estoppel rules apply in actions under 42 U.S.C. § 1983. Applying Mississippi preclusion rules, the Fifth Circuit held the state agency determination of "misconduct" bars the Petitioner's 42 U.S.C. § 1983 free speech claims. 564 F.3d 745 (5th Cir. 2009), cert. denied, ___ U.S. ___, 130 S.Ct. 139 (2009)[6]. App. 21. The Fifth Circuit remanded to district court for trial on the ADEA claim. *Id.*

On remand, the district court granted summary judgment on the ADEA claim. Petitioner again appealed. App. 11. On the second appeal, the Fifth Circuit affirmed the district court's grant of summary judgment, stating: "[I]t is clear that it was Cox's report of inmate abuse – and not her ADEA lawsuit – which set in motion the chain of events that culminated in her termination." 2011 WL 116318, *3 (5th Cir. 2011). App. 1. Furthermore, the Fifth Circuit upheld its earlier determination that collateral estoppel effect must be given to an unreviewed state

---

[6] Of course, the fact that this Court denied certiorari previously, App. 44, has no effect on this Court's decision as to whether to grant certiorari here. Denials of certiorari have no precedential value. *Hopfmann v. Connolly*, 471 U.S. 459, 460-61 (1985); citing *State of Md. v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) ("The Court has said this again and again . . . ").

administrative decision in a 42 U.S.C. § 1983 First Amendment claim.[7] *Id.*

Because other circuits disagree with the Fifth Circuit's applying state law preclusion rules to give collateral estoppel effect to an unreviewed state agency determination in a 42 U.S.C. § 1983 action, Petitioner requests this Court to review.

REASONS FOR GRANTING THE PETITION

THERE IS A CONFLICT BETWEEN THE COURTS OF APPEAL ON THE ISSUE OF WHETHER TO UTILIZE STATE OR FEDERAL COLLATERAL ESTOPPEL RULES IN AN ACTION UNDER 42 U.S.C. § 1983. ALSO, THERE IS A CONFLICT BETWEEN THE CIRCUITS ON WHETHER FEDERAL POLICIES PROHIBIT GIVING PRECLUSIVE EFFECT TO AN UNREVIEWED STATE AGENCY DECISION IN AN ACTION UNDER 42 U.S.C. § 1983.

The Fifth Circuit's applying state law to give collateral estoppel effect to a state agency's

[7] The lesson from this case is that a Mississippi employee who believes she was discharged in violation in constitutional rights should not apply for unemployment benefits. In two separate appeals, the Fifth Circuit has permitted a claim by three other jailers, who were also fired from DeSoto County, Mississippi because they reported assaults of inmates, to go forward. See *Williams, et al. v. Sheriff James Riley, et al.*, 275 Fed.Appx. 385 (5th Cir. 2008) and 392 Fed.Appx. 237 (5th Cir. 2010).

unreviewed finding of employee misconduct is based on *Univ. of Tennessee v. Elliott*, 478 U.S. 788 (1986). *Elliott* gave preclusive effect to a state agency's finding that petitioner "was not motivated by racial prejudice in seeking to discharge respondent." 478 U.S. at 790. However, the Fifth Circuit expanded *Elliott* when it applied state law preclusion rules to hold that an unreviewed state administrative decision on a state law issue has preclusive effect in a 42 U.S.C. § 1983 action based on a violation of the United States Constitution. The circuits are divided on this issue.

According to *DeSario v. Thomas*, 139 F.3d 80 (2nd Cir. 1998):

> The Circuits are split on whether a federal suit arising out of the same transaction(s) as a state administrative decision that has not been reviewed in state court is barred by res judicata. *Compare Dionne v. Mayor and City Council*, 40 F.3d 677, 685 (4th Cir. 1994) (no res judicata); *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1065 (11th Cir. 1987) (same), *with Miller v. County of Santa Cruz*, 39 F.3d 1030, 1034-35 (9th Cir. 1994) (applying res judicata).

DeSario, 139 F.3d at 86.

DeSario held that even if an unreviewed state agency decision can sometimes have collateral estoppel effect, it cannot have such an effect if the state agency had no jurisdiction to decide the federal

constitutional issue. 139 F.3d at 86-87. Specifically, *DeSario* stated:

> The Ninth Circuit is the only Circuit to apply res judicata to unreviewed state administrative proceedings. *See Miller,* 39 F.3d [1030] at 1034-35 [(9th Cir. 1994)]. *Miller* applied res judicata to bar a section 1983 action against a county when an administrative panel had ruled that the county's actions were lawful. But even in *Miller,* the court required that the plaintiff have had the opportunity to raise the federal issue in the state administrative proceeding; the district court noted specifically that "plaintiff has not presented any evidence to the court in support of his contention that he could not have raised his civil rights claims before the Commission." . . .

DeSario, 139 F.3d at 87, n. 4.

Contrary to the Fifth Circuit in this case, the Eleventh Circuit, in *Gjellum v. City of Birmingham, Ala.*, 829 F.2d 1056 (11th Cir. 1987), held that a non-judicially reviewed state agency decision does not have preclusive effect in an 42 U.S.C. § 1983 action, regardless of whether courts of the state from which the judgment arose would bar the 42 U.S.C. § 1983 claim. Conflicting with the Fifth Circuit's interpretation of *Univ. of Tennessee v. Elliott*, 478 U.S. 788 (1986), the Eleventh Circuit reasoned:

> In *Haring,* the Court held that "additional exceptions to collateral estoppel may be

> warranted in § 1983 actions in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights.'" *Haring* [*v. Prosise*], 462 U.S. [306] at 313-14 [(1983)], . . . *See also id.*, 462 U.S. at 322, . . . ("Adoption of petitioner's rule of preclusion would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights."); *McDonald v. City of West Branch*, 466 U.S. 284, 290, . . . (1984) (Arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights.").

Gjellum, 829 F.2d at 1064, n. 20.

Further,

> With respect to the claim preclusive effect of unreviewed state agency rulings, we conclude that the importance of the federal rights at issue, the desirability of avoiding the forcing of litigants to file suit initially in federal court rather than seek relief in an unreviewed administrative proceeding, and the limitations of state agencies as adjudicators of federal rights override the lessened federalism concerns implicated outside the

> contours of the full faith and credit statute . . .

Gjellum, 829 F.2d at 1064.

The Fourth Circuit agrees with the Eleventh Circuit. In holding a federal preclusion rule applies, and further holding that, under such a federal rule, unreviewed state administrative decisions do not bar 42 U.S.C. § 1983 claims, *Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677 (4th Cir. 1994) states:

> We therefore address the dispositive issue as one of claim preclusion: whether the unreviewed state administrative proceeding precludes a subsequent § 1983 claim which concededly [sic] arises out of the same transaction or series of transactions. Neither the Supreme Court nor this court has previously addressed the general question. The Eleventh Circuit recently has done so, holding that under federal common law, an unreviewed state agency decision should not have claim preclusive effect in a later "same transaction" § 1983 suit. *Gjellum v. City of Birmingham,* 829 F.2d 1056, 1070 (11th Cir.1987). We agree with the Eleventh Circuit's decision in that case, and, as did that court, hold that under federal common-law preclusion principles, the unreviewed state administrative agency decision at issue here does not have claim preclusive effect in a subsequent § 1983 suit even though the later

> suit arises out of the same transaction or series of transactions.

Dionne, 40 F.3d at 681-82 (footnotes omitted).

The Third Circuit also disagrees with the Fifth Circuit. *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3rd Cir. 1993), held that *Univ. of Tennessee v. Elliott* should not be expanded to give preclusive effect to an unreviewed state administrative decision in a 42 U.S.C. § 1983 case interpreting the United States Constitution. In the context of refusing to give collateral estoppel to a state unemployment decision in a 42 U.S.C. § 1983 action, *Edmundson* stated:

> The extent to which issue preclusion rules apply to unreviewed state administrative agency decisions is an unsettled area of the law. It is clear enough that when Congress has indicated that agency factual findings are not conclusive, as in the instances of Title VII, *Elliott,* 478 U.S. at 795-96, . . . , and the Age Discrimination Act, *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, ___, 111 S.Ct. 2166, 2172-73, . . . (1991), issue preclusion may not be based on unreviewed administrative decisions. As *Elliott* reiterated, however, no such congressional prohibition, express or implied, applies to section 1983 cases. 478 U.S. at 797, . . . Therefore, issue preclusion is applicable to factual findings to the same extent that it would be invoked by state courts.

> *Elliott* was quite specific, however, in referring consistently throughout the opinion to administrative or agency "factfinding." *Astoria* was less specific in stating that the repose resulting from claim and issue preclusion is desirable when "a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, *see University of Tennessee v. Elliott,* 478 U.S. 788, 798, . . . (1986), which acts in a judicial capacity." 501 U.S. at ___, 111 S.Ct. at 2169. *Astoria,* however, went on to say: "Although administrative estoppel is favored as a matter of general policy, its suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures." *Id.* 501 U.S. at ___, 111 S.Ct. at 2170.
>
> Based on the record here, we assume that the Borough Civil Service Commission acting in a judicial capacity, gave plaintiff ample opportunity to present his views and to cross-examine the witnesses against him. He had the requisite "full and fair" hearing. *See Elliott,* 478 U.S. at 797-99, . . . The factual findings are clear enough and would be effective for purposes of issue preclusion. It is the legal issue, the Commission's constitutional ruling, that we think is beyond the scope of *Elliott*'s holding.

Edmundson, 4 F.3d at 192 (footnote omitted).

Edmundson also noted the illogic of giving a state administrative agency final authority over a federal constitutional issue it had no jurisdiction to decide.

> We see a profound difference in the ability of a Commission composed of lay citizens to resolve matters of credibility and fact – e.g., whether plaintiff actually made the statements in the circumstances alleged despite his denials – and the ability to determine the more complex question of whether the statements are constitutionally protected in accordance with the considerations articulated in *Connick v. Myers*, 461 U.S. 138, 142, . . . (1983), and *Pickering v. Board of Education*, 391 U.S. 563, . . . (1968) . . . We intimate no disrespect for the Commission in stating that constitutional adjudication is not within its competence so as to bar a federal court from re-examining that legal issue. The Commission simply does not have the background or experience to finally decide issues that give pause even to federal courts despite their familiarity with that area of the law.

Edmundson, 4 F.3d at 192-93 (a citation omitted).

Contrasting with the Third Circuit (*Edmundson*), the Fourth Circuit (*Dionne*) and the Eleventh Circuit (*Gjellum*), the Fifth Circuit's holding in this case means that a state administrative agency, while addressing a state law issue, defines the meaning of the United States Constitution. The state agency decided only the issue of employment-related misconduct. It

did not decide the issue of whether Petitioner's speech is protected by the First Amendment.[8]

The unemployment hearing in this case involved a quibble from Respondent's officials about whether Petitioner actually saw the assault or whether it was good enough that she saw the deputy swing and hear a thud but did not actually see the deputy's fist strike the victim. Such a trivial debate is far removed from the policies underlying United States Constitution Amendment One, which protects all speech on matters of public concern so long as the speech is not intentionally false or in "reckless disregard of the truth." *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). The United States Constitution freedom of speech provision must be interpreted so as to give "freedom of expression the breathing space it needs to survive." *Bond v. Floyd*, 385 U.S. 116, 136 (1966).

Furthermore, the Fifth Circuit's holding that Petitioner "cannot now collaterally attack the [agency] decision" because she "failed to fully avail herself" of the appeal remedies available under state law, App. 21, conflicts with the Second Circuit's decision in *DeSario v. Thomas*, 139 F.3d 80 (2nd Cir. 1998). In that case, it was argued that before bringing a 42 U.S.C. § 1983 action, plaintiff should have exhausted

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[8] Under Mississippi law, misconduct may be found if an employee's actions represent a "disregard of the employer's interest." *Wheeler v. Arriola*, 408 So.2d 1381, 1383 (Miss. 1982).

his state law claims by appealing an adverse agency decision to the state courts. The Second Circuit emphatically rejected that contention as inconsistent with congressional policies of affording a federal remedy for constitutional violations. *DeSario* said:

> The Supreme Court has said that even if the state remedy is available in practice, it need not be exhausted before bringing a section 1983 suit. *See Patsy v. Board of Regents,* 457 U.S. 496, 516, . . . (1982). In *Patsy,* the Supreme Court held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."

DeSario, 139 F.3d at 85-86.

Thus, there is a disagreement between the Fifth and Second Circuits on the effect of the failure to appeal an adverse administrative decision to the state courts. The Fifth Circuit's barring this action because of failure to appeal an agency decision to the state courts detracts from the due process rule that "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481 (1982).

Other circuits implement this "fairness" principle by holding that the cursory nature of unemployment proceedings and their emphasis on speed, not accuracy, prohibits giving them collateral estoppel effect.

Hill v. Coca-Cola Bottling Co. of New York, 786 F.2d 550 (2nd Cir. 1986) stated:

> It would be unfair to penalize Hill, through the doctrines of res judicata and collateral estoppel, for employing authorized state procedures, particularly when the litigated issue in the unemployment insurance proceeding barely touched on the discrimination claim.
>
> Given the brief treatment of Hill's discrimination claim before the unemployment insurance appeal board, an administrative structure in New York that encourages separate consideration of unemployment insurance and discrimination claims, . . . we hold that Hill is not precluded from pursuing his discrimination claim in the district court because he did not have a full and fair opportunity to litigate that claim before the state's unemployment insurance agency.

Hill, 786 F.2d at 554 (citation omitted). *Accord*, *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 647 (11th Cir. 1987) (because of "narrow focus" of Georgia unemployment tribunal, its findings have no claim preclusive effect).

CONCLUSION

The United States Court of Appeals for the Fifth Circuit's applying state preclusion rules to bar a 42 U.S.C. § 1983 action conflicts with other circuits. Allowing an unreviewed decision of a state

administrative referee to determine the meaning of "free speech" diminishes the role of the federal courts in interpreting the United States Constitution. Courts of the United States, not a state administrative agency, should define the meaning of the United States Constitution. "It is emphatically the province and duty of the judicial department [the United States] to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-60405
Summary Calendar

ALICE FAYE COX,

Plaintiff-Appellant,

v.

DESOTO COUNTY, MISSISSIPPI,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC Nos. 1:03-CV-628 c/w 1:05-CV-323

(Filed Jan. 13, 2011)

Before WIENER, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

Alice Cox appeals the decision of the district court granting DeSoto County's motion for summary judgment on Cox's claim that the County terminated

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

her employment in retaliation for the lawsuit she filed under the Age Discrimination in Employment Act (ADEA). We affirm.

I

This is the second time we have heard an appeal related to these cases.[1] In August 2003, Cox was transferred from her secretarial position in the DeSoto County sheriff's office to a position in the "med room" of the County jail. In November 2003, she filed suit against the County in federal district court alleging that she was wrongfully transferred due to age discrimination prohibited by the ADEA and in violation of her First Amendment right not to campaign for the sheriff's reelection.

In October of 2004, while her first suit was pending, Cox submitted a written report to the jail administrator that she had witnessed an incident of inmate abuse. Specifically, the report stated that "Sgt. Winters hit Marcus in the back after he was down and handcuffed." Cox's report resulted in two investigations, one conducted internally by Commander James Dunn and the other by the DeSoto County District Attorney. Both investigations concluded that no misconduct occurred and that Cox gave inconsistent statements about the events she allegedly witnessed. When the investigations were

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[1] *See Cox v. DeSoto Cnty., Miss.*, 564 F.3d 745 (5th Cir. 2009).

complete, Cox was called before the Sheriff Department's Supervisory Board to explain her report. At the hearing, Cox admitted that she did not see Sergeant Winters make any abusive contact with the inmate. Ultimately, the board's five members voted to terminate Cox's employment for giving a false report.

Cox appealed that decision to the Department's Executive Board, before which she also testified. Seven voting members of the Executive Board unanimously affirmed the Supervisory Board's decision to terminate Cox's employment.

Cox then amended her complaint in the wrongful transfer lawsuit, contending that DeSoto County terminated her in retaliation for filing that suit and that the reason given for her firing was pretextual. She also claimed that she was terminated in violation of her First Amendment rights with respect to reporting abuse. She later filed a separate suit against several individual defendants, asserting claims based on her termination; that suit was consolidated with the original suit against the County.

Cox also filed for unemployment benefits. The Mississippi Employment Security Commission (MESC) denied her request for benefits, finding that she was discharged for work-related misconduct. After a hearing, an Appeals Referee affirmed the denial of benefits on the same grounds. After the Referee's decision was subsequently affirmed by a Board of Review, Cox filed an appeal in state court. However, she later voluntarily dismissed that appeal.

The United States District Court for the Northern District of Mississippi granted summary judgment in the County's favor on Cox's termination claims on the basis of collateral estoppel, finding that the MESC ruling barred relitigation of those claims in federal court. The wrongful transfer claims were tried to a jury, which found for Cox on the ADEA claim and for the County on the First Amendment claim related to the sheriff's reelection. The parties did not appeal the results of the jury trial, but Cox challenged the court's application of collateral estoppel and grant of summary judgment on the termination claims. This court upheld the grant of summary judgment on all claims except the ADEA retaliation claim, which we remanded in light of Supreme Court precedent "that collateral estoppel does not apply to state administrative decisions where Congress has provided for a detailed administrative remedy such as that found in the [ADEA]."[2]

After further discovery, the County again moved for summary judgment on the ADEA retaliation claim. The district court granted that motion, and this appeal followed.

II

We review the district court's grant of summary judgment de novo, applying the same standard as the

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[2] *Id.* at 748-49 (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110-14 (1991)).

district court.[3] Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[4]

The *McDonnell Douglas* burden-shifting framework applies to retaliation claims.[5] Under that framework, the burden first lies on the plaintiff – employee to establish a prima facie case of unlawful retaliation.[6] An employee establishes a prima facie case by showing 1) that she engaged in protected activity; 2) that an adverse employment action occurred; and 3) that a causal link existed between the protected activity and the adverse employment action.[7]

After the employee makes a prima facie showing, the employer must articulate a legitimate, non-discriminatory reason for the adverse employment action.[8] Once the employer does so, the burden shifts back to the plaintiff to "adduce sufficient evidence that would permit a reasonable trier of fact to find

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[3] *Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ.*, 579 F.3d 546, 549 (5th Cir. 2009).

[4] FED. R. CIV. P. 56(a).

[5] *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998).

[6] *Id.*

[7] *Id.* at n.8.

[8] *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

that the proffered reason is a pretext for retaliation."[9] Ultimately, the employee must "prove that the adverse employment action would not have occurred 'but for' the protected activity."[10] "The plaintiff must reveal a conflict in substantial evidence on the ultimate issue of retaliation in order to withstand a motion for summary judgment."[11] "Evidence is substantial if it is of such quality and weight that reasonable and fair minded persons in the exercise of impartial judgment might reach different conclusions."[12]

The district court held that Cox failed to establish a prima facie case. The court determined that Cox's original lawsuit and termination fulfilled the first two prongs, but that Cox failed to show that the lawsuit and termination were causally linked, as required by the third prong.

Cox argues that the temporal proximity between the original lawsuit and her termination is sufficient to support a causal link. This argument fails. Though we have previously held that "close timing between an employee's protected activity and an adverse action against him may provide the 'causal connection' required to make out a prima facie case of retaliation,"[13]

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[9] *Id.* (citing *McDonnell Douglas Corp.*, 411 U.S. at 804).

[10] *Id.*

[11] *Id.*

[12] *Id.* (internal quotation marks and citation omitted).

[13] *Swanson v. Gen'l Serv. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997).

the lengthy period of time between Cox's filing of the lawsuit and her termination – thirteen months – is insufficient to support an inference of causation.[14]

Absent an inference of causation due to temporal proximity, we have "determined that, in order to establish the causation prong of a retaliation claim, the employee should demonstrate that the employer knew about the employee's protected activity."[15] "It is well established that, 'in determining whether an adverse employment action was taken as a result of retaliation, our focus is on the final decisionmaker.'"[16] Cox has failed to show that any member of the disciplinary boards responsible for her termination was aware of her wrongful transfer lawsuit.

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[14] *See, e.g., Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002) (five month period alone not sufficient to support inference of causal link); *see also Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (noting that "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'" (citing cases holding that three- and four-month periods are insufficient to establish causality)).

[15] *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 883 (5th Cir. 2003) (citing *Medina v. Ramsey Steel Co., Inc.* 238 F.3d. 674, 684 (5th Cir. 2001)); *see also Sherrod*, 132 F.3d at 1122 ("In order to establish the causal link between the protected conduct and the illegal employment action as required by the prima facie case, the evidence must show that the employer's decision to terminate was based in part on knowledge of the employee's protected activity.").

[16] *Ackel v. Nat'l Commc'n, Inc.*, 339 F.3d 376, 385 (5th Cir. 2003) (quoting *Gee v. Principi*, 289 F.3d 342, 346 (5th Cir. 2002)).

Cox has also failed to present admissible evidence demonstrating that the disciplinary boards acted under the direction of a party with knowledge of Cox's ADEA lawsuit.[17] She presented no evidence that the sheriff or any other employee with knowledge of her protected activity recommended to the board that she be terminated. Cox did present an affidavit of a former Sheriff's Department employee who sat on the disciplinary boards prior to Cox's termination. The affiant stated that either the sheriff or his top deputy instructed the boards to reach certain results. The district court excluded this evidence, however, and because Cox does not challenge its exclusion on appeal, we do not consider it here.[18]

Finally, Cox argues that we should infer a causal link between her lawsuit and termination because the County's proffered reason for firing her – that she submitted false statements concerning inmate abuse – is false. After reviewing the record, it is clear that it was Cox's report of inmate abuse – and not her ADEA lawsuit – which set in motion the chain of events that culminated in her termination. Absent

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[17] *See Sherrod*, 132 F.3d at 1122 ("A causal link can be established by evidence that the ultimate decision maker, with final authority to hire and fire subordinate employees, merely 'rubber stamped' a recommendation to terminate made by an employee with knowledge of the complaint." (citing *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996))).

[18] *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452, 462 n.4 (5th Cir. 2003) ("Failure to raise an issue on appeal constitutes waiver of that argument.").

any specific evidence to the contrary, we cannot infer from the boards' decision to terminate Cox's employment that any board members had knowledge of Cox's original lawsuit. Accordingly, Cox cannot show that a causal link exists, a factor necessary to establish a prima facie case of retaliation.

Moreover, even assuming that a causal link could be established, Cox cannot show that her ADEA lawsuit was a "but for" cause of her termination, as she has not demonstrated "a conflict in substantial evidence on the ultimate issue of retaliation."[19] The district court, therefore, properly granted summary judgment in favor of the County.

III

Cox also urges us to revisit two issues resolved against her in her first appeal, Specifically, Cox challenges our holding that she is collaterally estopped from pursuing her other termination claims by the MESC's misconduct determination, as well as our refusal to consider her mixed-motive termination argument. Under the law of the case doctrine, neither the district court on remand nor the appellate court on a subsequent appeal may reexamine an issue of law or fact decided on an initial appeal.[20] One exception to the doctrine, which Cox argues should apply,

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[19] *Sherrod*, 132 F.3d at 1122.

[20] *See, e.g., Gene & Gene, LLC, v. BioPay, LLC*, 624 F.3d 698, 702 (5th Cir. 2010).

allows a court to reexamine a previously decided issue if the previous decision "was clearly erroneous and would work a manifest injustice."[21] However, Cox has not demonstrated that this court's previous determinations were clear error, and we are therefore prevented from revisiting them now.

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The judgment of the district court is AFFIRMED.

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[21] *Id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
EASTERN DIVISION

ALICE FAYE COX — **PLAINTIFF**

V. — **CASE NO: 1:03CV628**

DESOTO COUNTY SHERIFF'S DEPARTMENT and DESOTO COUNTY, MISSISSIPPI — **DEFENDANTS**

CONSOLIDATED WITH

ALICE FAYE COX — **PLAINTIFF**

V. — **1:05CV323**

JAMES RILEY, individually and in his official capacity as Sheriff of DeSoto County, Mississippi, JOHN CHAMPION, individually, CHARLES BROWN, and JAMES DUNN, individually and in their official capacities as deputy sheriffs and jail administrators of DeSoto County, Mississippi — **DEFENDANTS**

ORDER

(Filed May 13, 2010)

This cause comes before the court on the motion of defendants, The Desoto County Sheriff's Department and Desoto, County Mississippi (collectively "Desoto County"), for summary judgment.

Plaintiff, Alice Faye Cox, was a secretary in the Desoto County Sheriff's office. Cox was transferred to a position working in the jail. On August 18, 2003Cox filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging her age and refusal to campaign for the sheriff's re-election resulted in her transfer.

In October Cox was injured at work while opening a door and was off work for approximately three months. During that period she filed suit. Also during that period James Dunn, the head of internal affairs and personnel matters for the Desoto County Sheriff's Department asked one of his officers to review tapes of Cox working at the jail to ascertain "if anything was happening out of the way and [to see] how Ms. Cox opened the door."

On October 30, 2004 Cox reported witnessing a jailer hit an inmate that was handcuffed and subdued. Cox's report started an internal affairs investigation into the incident. The results of that investigation were turned over to the District Attorney's office which also conducted an investigation. Both investigations determined the jailer had not

acted improperly. During the investigation it was also determined that Cox had given inconsistent statements. On December 7, 2004 the Sheriff's Department Supervisory Board terminated Cox for giving a false report. Cox appealed that ruling which was affirmed by the Executive Board.

Cox then amended her complaint to include a claim that she was terminated in retaliation for filing an EEOC complaint. At this time Cox also filed for unemployment benefits. The Mississippi Employment Security Commission determined Cox was not eligible because she was discharged for misconduct. She initially appealed that decision to Circuit Court. Eventually that appeal was voluntarily dismissed.

Desoto County filed a motion for summary judgment in this court arguing the finding by the Mississippi Employment Security Commission collaterally estopped Cox's termination suit. This court agreed granting that motion. Cox's claims for wrongful transfer proceeded to trial. At trial the jury awarded damages based on Cox's claim she was transferred because of her age.

The jury rejected her claim that she was transferred based on her failure to campaign for the sheriff.

Cox appealed the court's summary judgment order. The Fifth Circuit affirmed in part and reversed in part that decision. The Fifth Circuit held that the Age Discrimination in Employment Act ("ADEA") claims were not limited by the state agency ruling.

Following remand and additional discovery Desoto County filed the instant motion. Desoto County argues it is entitled to summary judgment because Cox can not establish a *prima facie* case of discrimination or alternatively that even if she can establish a *prima facie* case Cox can not carry her ultimate burden in light of Desoto County's offered legitimate non-discriminatory reason for her firing.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In reviewing the evidence, this Court must draw all reasonable inferences in favor of the nonmoving party, and avoid credibility determinations and weighing of the evidence. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). In so doing, the Court must disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves*, 530 U.S. at 151, 120 S.Ct. at 2110.

Cox attempts to establish her claim through circumstantial evidence triggering the familiar *McDonnell Douglas* burden shifting test. *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792 (1973). In order to make out a *prima facie* case of retaliation under the ADEA Cox must show: (1) she engaged in an activity protected by the ADEA; (2) she suffered an adverse employment action; and, (3) a causal connection exists between the protected activity and the adverse employment action. *Webb v. Cardiothoracic Surgery Assoc.*, 139 F.3d 532, 540 (5th Cir. 1998).

There is no dispute that Cox engaged in a protected activity when she filed suit alleging she was terminated because of her age or that she suffered an adverse employment action when she was terminated.

Cox alleges the temporal proximity between her protected activity and the adverse employment decision show the necessary causal connection. Additionally, Cox argues that the investigation leading to her termination was flawed and was a "witch hunt."

Temporal proximity between a protected activity and an adverse employment action can establish the necessary causal connection. *See Washburn v. Harvey*, 504 F.3d 505, 511 (5th Cir. 2007). However, temporal proximity only proves causation "when the protected act and the adverse employment action are 'very close' in time." *Id.* (quoting *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001)).

In this case Cox filed her EEOC complaint in August 2003. She was not terminated until December 2004. This sixteen month period does not meet the 'very close' test handed down by the Supreme Court. *See Clark County School Dist.*, 532 at 273-74 (holding

that a two or three month period might be close enough to prove causation, but a twenty month window was too long to establish *prima facie* causation); *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002) (holding a five month period by itself does not support an inference of causation).

Instead of distinguishing this and other similar cases Cox argues the court should look at a different event in calculating the time between the protected activity and the adverse employment action. Cox asks the court to look at date when Dunn asked his employee to review the tapes of Cox working. Cox argues this event was designed to find an excuse to fire her.

However, no matter the reason for the investigation[1] courts must look only to adverse employment actions in deciding if temporal proximity has established a causal connection. In the retaliation context adverse employment actions are "action[s] that 'a reasonable employee would have found . . . [to be] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *McCullough v. Houston County Tex.*, 297 Fed. Appx. 282, 288 (5th Cir. 2008) (quoting *Burlington N. &*

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[1] The court does not reach the question of whether there is any evidence that Dunn ordered the investigation in order to find an excuse to terminate Cox or whether the investigation was in response to Cox's accident. The court notes the investigation found no problems with Cox's work activities and resulted in no action being taken against her.

Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)). This initial investigation does not meet the standard required for an event to become an adverse employment action. It would therefore be improper for the court to consider it in determining whether a temporal proximity causal connection exists in this matter.

Cox next states Desoto County's policy was to encourage employees to report abuse of inmates and that under such a policy "[t]he witch hunt and hounding that Cox endured because of her report . . . makes no sense whatsoever unless it was retaliation" for her filing of an EEOC complaint. The court deduces the basis of Cox's argument is that she actually saw an inmate being beaten and that Desoto County obviously would not have fired her reporting factually accurate information about a crime unless it was pretext for its desire to fire her for filing an EEOC complaint. She attempts to couple this with the fact the ultimate decision makers knew about her complaint and were influenced by the complaint to fire her.

Under Fifth Circuit law a plaintiff can prove a causal link if "the evidence . . . show[s] that the employer's decision to terminate was based in part on knowledge of the employee's protected activity." *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). A majority of the board members who voted to terminate Cox did not have knowledge of Cox's complaint.

Even though some of the ultimate decision makers did not have knowledge of the complaint, causation

might still established by showing those decision makers "merely 'rubber stamped' a recommendation to terminate made by an employee with knowledge of the complaint." *Id.* (quoting *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996)).

None of the depositions submitted to the court show the board members rubber stamped Cox's termination. Cox relies on an affidavit submitted by Janet Taylor. Taylor, a former jail administrator, stated:

> While there I sat on boards of review which heard appeals from employees regarding disciplinary and termination matters. Before every board hearing, all of the board members knew what the result was going to be. We were told what to do by either Chief Deputy Brown or Sheriff Riley, himself. The sheriff always knew what was going on and Chief Brown constantly kept him informed about all matters.
>
> As a matter of fact, the board hearing process was so unfair that I began sending my assistant to sit in my place because I could not stomach the unfairness of the process. There were a few occasions out of all the boards I sat on in which I did not follow orders and vote as I was told to. The sheriff would cuss me out in instances like that.
>
> I have never known any of the boards to reverse a supervisor's actions related to discipline or termination, although they sometimes varied in how much discipline they might give out.

> The sheriff has occasionally overturned board decisions, but it was usually instances where someone had campaigned for the sheriff, was somebody's relative, or for other personal reasons not related to performance or conduct of the individual involved.

The court finds this statement to be inadmissible and thus improper summary judgment evidence. Taylor was terminated from the sheriff's department prior to any events relevant to this matter. She has no personal knowledge of how the boards were constituted or operated at the time of Cox's termination. The evidence Taylor offers does not fit within the permissible bounds of Federal Rule of Evidence 404.

Additionally, this evidence does not fall within Federal Rule of Evidence 406 which allows evidence of habits. While Taylor initially uses the word "always" in describing the boards' actions she later backs away from that position. Taylor admits that the boards sometimes broke from the decisions appealed to them. As used in Rule 406 habit means "a specific reation [sic] to a specific set of stimuli that is reflexive, repeated, and invariable in nature." *Pursley v. Bretke*, 114 Fed. Appx. 630, 634 (5th Cir. 2004). Taylor's [sic]

Based on the decision to exclude this evidence there is nothing to show the boards simply rubber stamped the decisions presented to them.

Taking the evidence in the light most favorable to Cox there are problems with the two investigations into the incident at the jail. The findings of those

investigations were presented to the boards that decided to terminate Cox. As such her termination may have been based on faulty information. The general rule under Mississippi law is that an individual may be fired for a good reason, a bad reason, or no reason at all. *See DeCarlo v. Bonus Stores, Inc.*, 989 So.2d 351, 354 (Miss. 2008) (citing *Kelly v. Miss. Valley Gas Co.*, 397 So.2d 874, 875 (Miss. 1981)). A jury might consider that a termination based on a faulty investigation was a termination for a bad reason. However, it was not a termination for a discriminatory reason as required to proceed under the ADEA.

Nothing in the record links Cox's complaint with her termination. Her termination did not occur for sixteen months after she filed her complaint. Further there is no evidence the decision making boards knew about the complaint. Based on this evidence Cox can not carry her burden of establishing a causal link between her EEOC complaint and her termination.

Desoto County's motion for summary judgment is GRANTED.

This the 13th day of May, 2010.

/s/ MICHAEL P. MILLS
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60004

ALICE FAYE COX

Plaintiff-Appellant

v.

DESOTO COUNTY, MISSISSIPPI

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Mississippi

(Filed Apr. 3, 2009)

Before SMITH, OWEN, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Alice Cox appeals the decision of the district court granting summary judgment against her claims based upon the defense of collateral estoppel emanating from a ruling in an administrative proceeding. For the reasons set forth below, we REVERSE the judgment as to her ADEA retaliation claims and REMAND those claims; we AFFIRM the remainder of the district court's judgment.

I.

Factual Background

Cox was a secretary in the sheriff's office of DeSoto County. She alleges that, as a result of her age and her refusal to campaign actively for the sheriff's re-election, she was transferred from her secretarial position to a position in the jail for which she was not trained or qualified. In November of 2003, she filed suit on these claims; she continued to be employed at the jail. In October of 2004, while her first suit was pending, she made a report to her jail supervisor to the effect that she had witnessed abuse of a jailed inmate by several officers.

Following an investigation by the DeSoto County District Attorney's office, it was found that no misconduct occurred and that Cox gave inconsistent statements about the events she allegedly witnessed. Cox was terminated for giving a false report. She amended her complaint in the wrongful transfer lawsuit, contending that DeSoto County terminated her in retaliation for filing the wrongful transfer lawsuit and that the reason given for her firing was pretextual. She later sued several individual defendants, such as the sheriff and the district attorney; that suit was consolidated with the original DeSoto County suit.

Cox filed for unemployment benefits. The Mississippi Employment Security Commission (MESC) conducted a hearing and determined that Cox was not eligible for benefits because she was discharged for work-related misconduct. She unsuccessfully

appealed to an Appeals Referee and Board of Review. She then filed an appeal in the local circuit court, which she ultimately dismissed.

After the dismissal of her administrative case, the defendants in the wrongful transfer/termination case filed a motion for summary judgment contending that the collateral estoppel effect of the MESC ruling barred her case in federal district court. The court granted the summary judgment as to the termination claims, but it conducted a jury trial on the original transfer claims. The jury found for Cox on the age claim and for the County on the First Amendment claim (relating to the sheriff's re-election campaign issue). The district court entered judgment on the jury verdict and the previously-granted summary judgment.

On appeal, no one challenges the judgment on the jury verdict, so we do not consider the original wrongful transfer claims. The other claims are based upon the contention that Cox was fired for filing the original wrongful transfer lawsuit, a suit predicated partially on age discrimination, and the contention that the county's proffered reasons for Cox's discharge were false and pretextual.[1]

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[1] Although couched as violations of constitutional rights and interference with employment, her claims against the individual defendants are based upon the same contention – that they caused her to lose her job because of the wrongful transfer suit and that their handling of the investigation was biased and improper.

II.

Standard of Review

Because the appeal concerns only the portion of the judgment that was based upon the court's original summary judgment, our review is de novo.[2] *Adams v. Travelers Indem. Co.*, 465 F.3d 156, 163 (5th Cir. 2006).

III.

Discussion

A. Should this Court Give Collateral Estoppel Effect to the MESC's Findings?

The law is clear that "when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts." *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986) (internal quotation marks, alteration, and citation omitted). In Mississippi, administrative decisions are given preclusive effect. *Smith v. University of Mississippi*, 797 So. 2d 956, 963 (Miss. 2001). Specifically, the decisions of the MESC are given

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[2] Defendants contend that Cox failed to appeal properly this case as against the individual defendants. While it is not a model notice of appeal, we conclude that Cox adequately filed her appeal against all defendants.

preclusive weight in Mississippi courts, if supported by the evidence and in the absence of fraud. MISS. CODE ANN. § 71-5-531 (Rev. 2000); *Raiola v. Chevron U.S.A., Inc.*, 872 So. 2d 79, 84 (Miss. Ct. App. 2004).

Although Cox voluntarily dismissed her judicial appeal of the MESC ruling, she now seeks to attack that ruling collaterally by contending that a non-judicially reviewed decision of the MESC should not be granted preclusive effect. She also contends that the ruling was not based upon substantial evidence and was tainted with fraud. Cox's failure to fully pursue an appeal under § 71-5-531 does not undermine the preclusive effect of the MESC's decision. *See Raiola*, 872 So. 2d at 84 (forbidding collateral attack of MESC decision where claimant sought and received voluntary dismissal of appeal under § 71-5-531). If there were no opportunity for judicial review, we would have a potentially different situation. Here, however, it is Cox who failed to pursue her appropriate avenues to challenge the judgment. Had she done so, she would have had the opportunity to present evidence, if any, that the MESC's decision was tainted by fraud or based on a lack of substantial evidence. *See NCI Bldg. Components v. Berry*, 811 So. 2d 321, 329 (Miss. Ct. App. 2001) (noting that a court lacks the power to overturn the findings of the MESC unless evidence is presented that the findings are "riddled with fraud" or based on a lack of substantial evidence). Because Cox failed to fully avail herself of this avenue, she cannot now collaterally attack the MESC's decision.

B. Does Collateral Estoppel Bar Cox's Claims?

The parties concede, under Supreme Court authority, that collateral estoppel does not apply to state administrative decisions where Congress has provided for a detailed administrative remedy such as that found in the Age Discrimination in Employment Act (ADEA). *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 110-14 (1991). The ADEA has an anti-retaliation section which was arguably implicated by Cox's complaint that she was discharged in retaliation for filing her original complaint under the ADEA. *See* 29 U.S.C. § 623(d). Defendants contend that Cox failed to raise this issue in the district court, but we note that she did raise it, albeit not in great detail.[3] Thus, we conclude that Cox's claims based upon the ADEA anti-retaliation provisions are not barred by collateral estoppel.

Cox's remaining claims that were not addressed by the jury verdict center on the alleged wrongfulness of her discharge. Other than the ADEA retaliation claim, they are barred by the preclusive effect of the MESC finding regarding the reason for her discharge. In her reply brief, Cox claims that the MESC finding, even if true, would not prevent her claims because

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[3] In the district court, Cox stated: "Also to the extent Plaintiff's claims are based on the anti-retaliation provisions of the ADEA, collateral estoppel does not bar these claims, because state administrative provisions which are not judicially reviewed do not have preclusive effects on claims made pursuant to a detailed administrative scheme to regulate employment discrimination."

her discharge could have been caused by a mixed motive – her misconduct and a protected reason. At oral argument and by subsequent letter to the court, her attorney conceded that he could not point to any place where a mixed-motive claim was raised in the district court.[4] *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 344 n.3 (5th Cir. 2007) ("It is well settled that we do not consider issues raised for the first time on appeal."). Additionally, we customarily do not consider an appeal point raised for the first time in a reply brief. *Carmona v. Southwest Airlines Co.*, 536 F.3d 344, 347 n.5 (5th Cir. 2008). Thus, we do not reach the question of whether a mixed-motive claim would survive the MESC finding in this case.

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[4] In a post-argument letter, Cox's counsel contends that this court should consider the mixed-motive issue despite the absence of any raising of this issue before the district court, citing to certain Seventh Circuit cases. *See Flynn v. Sandahl*, 58 F.3d 283 (7th Cir. 1995); *Johnson v. Gudmundsson*, 35 F.3d 1104 (7th Cir. 1994); *Glass v. Dachel*, 2 F.3d 733 (7th Cir. 1993). However, he concedes that Fifth Circuit precedent, by which we are bound, is to the contrary. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005) ("It is well settled in this Circuit that the scope of appellate review on a summary judgment order is limited to matters presented to the district court."). Our cases are clear that mixed-motive must be raised in the trial court by the party seeking to rely upon it on appeal. *See Nasti v. CIBA Specialty Chem.*, 492 F.3d 589, 595 (5th Cir. 2007) (finding waiver of mixed-motive claim because no concession of legitimate, non-discriminatory reason for discharge made before district court). Cox did not raise this issue anywhere before the district court – in her pleadings or in the summary judgment papers. Thus, we decline to address this issue for the first time at this late date.

IV.

Conclusion

For the foregoing reasons, summary judgment on Cox's claims based upon retaliation in violation of the ADEA anti-retaliation provisions is REVERSED and those claims are REMANDED to the district court for proceedings consistent with this opinion. In all other respects, the district court's judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
EASTERN DIVISION

ALICE FAYE COX — **PLAINTIFF**

V. — **CASE NO: 1:03CV628**

DESOTO COUNTY SHERIFF'S DEPARTMENT and DESOTO COUNTY, MISSISSIPPI — **DEFENDANTS**

CONSOLIDATED WITH

ALICE FAYE COX — **PLAINTIFF**

V. — **1:05CV323**

JAMES RILEY, individually and in his official capacity as Sheriff of DeSoto County, Mississippi, JOHN CHAMPION, individually, CHARLES BROWN, and JAMES DUNN, individually and in their official capacities as deputy sheriffs and jail administrators of DeSoto County, Mississippi — **DEFENDANTS**

MEMORANDUM OPINION

(Filed May 1, 2007)

This cause comes before the court on the defendant DeSoto County's motion for summary judgment on the plaintiff's termination claim. Plaintiff Cox has filed a motion in response. The court has reviewed the briefs and submissions and is prepared to rule.

This cause of action was filed on November 12, 2003. The plaintiff alleged that she suffered an undesirable transfer as a result of her failure to support the sheriff in his campaign for reelection. On December 29, 2004, Cox filed an amended complaint to add an additional claim of retaliation since she had been terminated on December 7, 2004, for allegedly giving a false statement in relation to an incident of abuse of a prisoner. A trial date was set for November 14, 2005; however, on November 10, 2005, the plaintiff moved to add a claim that her termination was caused by a violation of her First Amendment rights. The motion was granted and the trial date was continued so as not to prejudice the defendants. On November 16, 2005, Cox filed a motion to dismiss her appeal of the Mississippi Department of Employment Security decision related to her termination that was pending in DeSoto County Circuit Court. The DeSoto County Circuit Court dismissed the appeal on December 5, 2005, and on December 7, 2005, the plaintiff filed a suit against individual defendants Riley, Champion, Dunn, and Brown (1:05cv323). The suit

against the individual defendants was consolidated with the instant action on November 16, 2006.

The defendant now moves for summary judgment on two grounds. First, the defendant contends that collateral estoppel and/or res judicata bars her termination claim. Second, the defendant contends that the First Amendment does not protect the speech that led to her termination because she was speaking pursuant to her employment duties.

ANALYSIS

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In reviewing the evidence, this Court must draw all reasonable inferences in favor of the nonmoving party, and avoid credibility determinations and weighing of the evidence. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). In so doing, the Court must disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves*, 530 U.S. at 151, 120 S.Ct. at 2110.

Plaintiff Cox filed an initial claim for benefits with the Mississippi Department of Employment Security, which was denied on December 29, 2004. The plaintiff was disqualified for benefits based on the ground that she was discharged for misconduct connected with work. She filed a notice of appeal to the Appeals Referee on January 4, 2005, and the hearing was held on January 24, 2005. The decision was affirmed on January 28, 2005. The plaintiff then filed a notice of appeal to the Board of Review, which affirmed the decision on March 3, 2005. Plaintiff Cox then filed an appeal in the DeSoto County Circuit Court, which she voluntarily dismissed December 5, 2005.

DeSoto County maintains that the plaintiff's termination claims are issue precluded. The Fifth Circuit has clearly recognized that federal courts must give an agency's fact finding the same preclusive effect that they would a decision of a state court, when the state agency is acting in a judicial capacity and gives the parties a fair opportunity to litigate. *Stafford v. True Temper Sports*, 123 F.3d 291, 294 (5th Cir. 1997). The defendant has conceded that this court must accept that the Mississippi Employment Security Commission's administrative decision estops the plaintiff's termination claim. Accordingly, this court does not reach the question of First Amendment protection and the defendant's motion for summary judgment on Cox's termination claim is GRANTED on the basis of res judicata.

Mississippi Tort Claims Act

This court administratively dismissed motion 17, the defendants' motion to dismiss, in member case *Cox v. Riley* (1:05cv323) due to the duplication of the res judicata claim made in the lead case. The court now takes up other issues raised in motion 17.

> In considering a motion to dismiss, the complaint should be construed in favor of the plaintiff, and all facts pleaded should be taken as true. Motions "to dismiss for failure to state a claim [are] 'viewed with disfavor, and [are] rarely granted.'" A Rule 12(b)(6) dismissal will not be affirmed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."
>
> *S. Christian Leadership Conference v. Supreme Ct. of La.*, 252 F.3d 781, 786 (5th Cir. 2001) (citations omitted).

Defendants Riley, Brown, and Dunn contend that the plaintiff's state law claims are barred because Plaintiff Cox did not comply with the notice provisions of the Mississippi Tort Claims Act. The Mississippi Tort Claims Act requires that a person file a written notice of a claim in person or by registered or certified mail with the chief executive officer of a government entity before proceeding with a civil action. *See* Miss. Code Ann. 11-46-11(1). The notice must be given at least ninety days prior to commencing action.

The plaintiff asserts that her state law claim for malicious interference with employment is not barred

by the Mississippi Tort Claims Act. Any state claim for which the plaintiff did not provide adequate notice must be dismissed; however, claims based on allegations of "malice" fall outside the scope of the MTCA. Specifically, Miss. Code. Ann. § 11-46-7(2) provides as follows:

> (2) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, *malice*, libel, slander, defamation or any criminal offense.

As this issue is raised by Riley, Brown, and Dunn, this court will only address allegations of malice directed at these parties. The allegations in the plaintiff's complaint only assert malicious interference with employment contract by Defendant Dunn. The plaintiff's allegations accuse Dunn of intentionally withholding information in order to cause Cox to lose her job. At this stage, the plaintiff's allegations must be accepted as true, which would ordinarily require that Cox's claim of malicious interference

with employment contract survive the motion to dismiss. However, as summary judgment has been granted on the basis of res judicata with respect to the plaintiff's termination claims, Cox's claim for malicious interference with employment contract must fail.

Official Capacity Claims

The defendants also assert that allegations against Riley, Dunn, and Brown in their official capacities are essentially the same allegations made against DeSoto County in the *Cox v. DeSoto County*, and that any official capacity claims be dismissed to avoid duplicate litigation. This point has been rendered moot due to the consolidation of the cases on November 16, 2006.

Individual Capacity Claims

The plaintiff has raised individual capacity claims unrelated to her termination against defendants Riley and Brown. She alleges that they caused her to be transferred from her secretarial position to a job in the medroom due to her failure to actively campaign for Sheriff Riley's reelection. Individual capacity suits impose individual liability upon a government officer for actions taken under color of state law; therefore, a plaintiff must show that an official acting under color of state law caused the deprivation of a federal right. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 362, 116 L.Ed. 301 (1991). Officials sued in their

individual capacities may assert the personal immunity defense that he or she acted in objectively reasonable reliance on existing law. *Id.* Reasonableness is assessed in light of the legal rules that were "clearly established" at the time action was taken. *Thompson v. City of Starkville, Mississippi*, 301 F.2d 456, 468-69 (5th Cir. 1990).

The defendants only address the plaintiff's termination claims in their argument, but Cox's claims related to her transfer clearly allege a violation of her First Amendment rights. A public employer cannot act against an employee because of the employee's affiliation or support of a rival candidate unless the employee's activities in some way adversely affect the government's ability to provide services. *Brady v. Fort Bend County*, 58 F.3d 173, 175 (5th Cir. 1995). Assuming her allegations are true, Riley and Brown violated Cox's clearly established First Amendment rights. According to Cox, her transfer occurred due to her refusal to campaign for the sheriff. The defendants did not address this issue in their motion; therefore, there were no assertions that her lack of support for Riley interfered with her secretarial duties or the functioning of the DeSoto County Sheriff's Department in general. A reasonable official would understand that an employee has the right to support or not support any candidate of his or her choosing. Accordingly, Riley and Brown are not entitled to qualified immunity with regard to the plaintiff's retaliatory transfer claim.

Defendant John Champion

The court also administratively dismissed Defendant John Champion's motion to dismiss until resolution of the res judicata issue relating to Plaintiff Cox's termination claim. All claims against Champion relate to the plaintiff's termination. As summary judgment has been granted with respect to the plaintiff's termination claims, the motion is moot.

This court finds that:

1. Defendant DeSoto County's motion for summary judgment on the termination claim is GRANTED;

2. State law claims against defendants Dunn, Riley, and Brown are DISMISSED (pursuant to motion 17 in member case);

3. Dunn, Riley and Brown's motion to dismiss the official capacity claims against them has been rendered MOOT due to case consolidation;

4. Riley and Brown's motion for qualified immunity is DENIED with respect to Cox's retaliatory transfer claims; and

5. Defendant Champion's motion to dismiss is MOOT (pursuant to motion 24 in member case).

This the 1st day of May, 2007.

/s/ Michael P. Mills
UNITED STATES DISTRICT JUDGE

MISSISSIPPI DEPARTMENT OF
EMPLOYMENT SECURITY
Board of Review CC: 470
OFFICE OF REFEREE
DECISION OF APPEALS REFEREE
– L –

SS# [Social Security Number Omitted]
Docket No.: 00107-R-05-01

ALICE COX
[Address Omitted In Printing]
SOUTHAVEN MS 38671

DESOTO COUNTY
SHERIFF DEPT
365 LOSHER STREET
STE 320
HERNANDO MS 38632

An initial claim for benefits under the Mississippi Department of Employment Security Law was filed by the above-named individual, hereinafter called claimant, effective DECEMBER 05, 2004 On DECEMBER 29, 2004, the Claims Examiner disqualified Claimant for benefits under section 71-5-513A(1)(b) of the Law on the ground claimant was discharged for misconduct connected with the work. Claimant filed Notice of Appeal from that determination on JANUARY 04, 2005. A hearing before the Referee was held on JANUARY 24, 2005, at which the claimant and the employer representative and four witnesses for the employer appeared and testified.

Based upon the record, testimony and certain documents of evidence, the Referee finds as follows:

FINDINGS OF FACT:

The claimant was employed as a medical room jailer from August 7, 2001, through December 7, 2004, with the Desoto County Sheriff Department. The Claimant was discharged for submitting a false report of inmate abuse. On October 30, 2004, the claimant went to the jail administrator to inform the employer she had witnessed an officer abusing and using excessive force on an inmate. The claimant was instructed to make a written report of the actions she witnessed. The claimant prepared a written statement in which she accused one officer of hitting an inmate in the back after he was down and handcuffed and accused another officer of kicking the inmate while he was down and handcuffed. The employer initiated an investigation during which the claimant, the inmate involved, other witnesses to the incident, and all officers involved were interviewed. During the claimant's interview, she stated she did not actually see any officer make any physical contact with the inmate. The claimant testified that due to what she did see and hear during the incident, she assumed the officers struck the inmate as she described in her statement. Through interviews with other witnesses, the inmate involved and the officers involved, it was determined the claimant's statements that the officers who physically abuse the inmates was false. The employer also took into consideration the claimant stated during her interview she did not actually witness any officer physically strike the inmate despite her original statement which accused two officers of

inmate abuse. The employer's policy states any employee who knowingly provides false, incorrect, or deceptive information in connection with any duty assignment or investigation is subject to automatic termination from employment. The claimant was discharged on December 7, 2004, in accordance with the employer's policy.

OPINION:

Section 71-5-513A(1)(b) of the Law provides that an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which he was discharged for misconduct connected with the work, if so found by the department, and for each week thereafter until he has earned remuneration for personal services equal to not less than eight (8) times his weekly benefit amount as determined in each case.

In the Mississippi Supreme Court, in the case of *Wheeler v. Arriola*, 408 So.2d 1381 (Miss. 1982), the Court held that:

"The meaning of the term 'misconduct', as used in the unemployment compensation statute, was conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect from his employees. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an

intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgement or discretion were not considered 'misconduct' within the meaning of the statute."

An employee shall not be found guilty of misconduct for the violation of a rule unless: (1) the employee knew or should have known of the rule; (2) the rule was lawful and reasonably related to the job environment and job performance; and (3) the rule is fairly and consistently enforced. (MDES Administrative Manual Part V, Paragraph 1720).

The facts in this case show the claimant submitted a written statement on October 30, 2004, stating she witnessed two officers physically abuse and [sic] inmate. The facts of this case also show the claimant did not witness what she indicated in that statement. It is the opinion of the Referee, the claimant's actions violated a reasonable and known policy of the employer. It is also the opinion of the Referee the claimant's actions do rise to a level of misconduct as that terms is defined. The Claims Examiner's decision in this case is in order.

DECISION:

Affirmed. Claimant is disqualified from December 8, 2004; and until she has been reemployed under covered employment and has earned eight times her weekly benefit amount or $1,680. This employer, being a reimbursable employer, is required to reimburse their proportionate share of benefits paid to claimant during the current benefit year based on this separation.

Dated and mailed from Jackson, Mississippi, this the 25th day of January 2005.

This decision will become final fourteen (14) days after the date indicated above unless you file an appeal with the Board of Review *within that time; or, if neither you nor your representative attended your hearing, you may file a written request with the Referee for a rehearing within the aforesaid fourteen (14) days. Your request should state the reason you failed to attend. The Referee will determine if good cause exists to grant a rehearing.* This appeal may be filed at the nearest Claims Center Office or by a letter addressed to the Mississippi Department of Employment Security, Board of Review, PO Box 1699, Jackson, Mississippi, 39215-1699. Holidays and weekends will not extend the time for filing an appeal.

IF AN APPEAL IS TAKEN TO THE BOARD OF REVIEW, SUCH APPEAL WILL BE CONSIDERED ON THE RECORD PREVIOUSLY MADE AND NO HEARING BEFORE THE BOARD WILL BE SCHEDULED.

IMPORTANT NOTICE TO CLAIMANT: Should an appeal to the Board of Review be filed, you should continue to file your Claim weekly pending receipt of the Board of Review's decision, for the reason that should the Board's decision be favorable to you, benefits will be paid only for those weeks actually claimed.

/s/ Chris Cockrell
CHRIS COCKRELL, Appeals Referee

130 S.Ct. 139

Supreme Court of the United States
Alice Faye COX, petitioner,
v.
DeSOTO COUNTY, MISSISSIPPI.

No. 08-1516.
Oct. 05, 2009.

Case below, 564 F.3d 745.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

U.S.,2009
Cox v. DeSoto, County, Miss.
130 S.Ct. 139, 107 Fair Empl.Prac.Cas. (BNA) 672, 175 L.Ed.2d 35, 77 USLW 3691, 78 USLW 3013, 78 USLW 3161, 78 USLW 3171

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-60405

ALICE FAYE COX,

Plaintiff-Appellant

v.

DESOTO COUNTY, MISSISSIPPI,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

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ON PETITION FOR REHEARING EN BANC

(Filed Feb. 10, 2011)

(Opinion 1/13/11, 5 Cir., ___, ___, F.3d ___)

Before WIENER, PRADO, and OWEN, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Priscilla A. Owen
United States Circuit Judge